



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

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MARY F. MCTIGUE
DIRECTOR

August 22, 1991
AO-91-18

Ms. Nancy M. Oates
Town Clerk
Office of Town Clerk
Duxbury, MA 02332

Re: M.G.L. c.55, s.22A
Reimbursement on Pro Rata Basis

Dear Ms. Oates:

This letter is in response to your July 24, 1991, letter requesting an advisory opinion regarding restitution pursuant to M.G.L. c.55, s.22A.

I have carefully reviewed all the material that has been forwarded to the Office on this matter including, in particular, the April 18, 1991, Newsletter ("Newsletter"), May 15, 1991, Memorandum from Superintendent Kennedy to you ("Memorandum"), your May 23, 1991, Memorandum and Order to Superintendent Kennedy ("Order") and Attorney Rebecca L. Bryant's July 11, 1991, letter to Superintendent Donald Kennedy ("Bryant Letter").

The facts of this matter appear undisputed. On April 17, 1991, approximately 6,000 copies of the Newsletter (which, among other things, urged readers "to support . . . the general override") were mailed to the residents of Duxbury. The Newsletter was paid for by the Duxbury Public Schools. Based upon conversations with Pat Carli, Director of Auditing, and Peter Sturges, General Counsel, as well as your understanding of the campaign finance laws, you concluded that public funds had been spent in violation of M.G.L. c.55. Thereafter, you were informed by the Memorandum¹ of the costs incurred to produce and mail the Newsletter and received from the Town Treasurer Form CPF M22A also listing the amount of public funds expended to produce and mail the Newsletter. In accordance with M.G.L. c.55, s.22A, you issued the Order directing

¹ In the Memorandum, the Superintendent states that he has asked an organization called Pride for a donation to cover 1/6 of the cost of the Newsletter. This appears to be in violation of M.G.L. c.55, s.13 as outlined in the advice set forth in Part D of the Bryant Letter.

restitution of the full amount reported in the Memorandum and, I assume, the Form CPF 22A, specifically \$657.74. After you issued your order you received a copy of the Bryant Letter.

The Bryant Letter is generally consistent (with the exception discussed below) with this Office's interpretation of chapter 55 as construed by the Supreme Judicial Court in Anderson v. City of Boston, 376 Mass. 178, 380 N.E. 2nd 628 (1978), appeal dismissed, 439 U.S. 1069 (1979). Of specific concern to your question, the Bryant Letter advises Superintendent Kennedy that "the long standing practice of publishing newsletters on school programs and finance may allow the reporting and restitution of only that portion of the 1991 newsletter urging support of the override" (emphasis in original). It then sets forth various arguments in support of this advice and concludes that it is appropriate for the Superintendent to seek reconsideration of the Order. See Bryant Letter at pages 3 and 4. You have decided to affirm your original decision to order full restitution and ask this Office for guidance. You have also asked about the appropriateness of any legal costs being incurred by the school superintendent, e.g., the Bryant Letter. I will address these two questions separately.

I. Pro Rata Reporting and Restitution

M.G.L. c.55, s.22A requires a town treasurer to file a report with the town clerk "setting forth the amount or value of every gift, payment, expenditure of (sic) contribution" made "in order to influence or affect the vote on any . . . [local ballot] question. In turn, the clerk must "examine the accounts submitted" by the treasurer, and "may order restitution of public funds . . . spent contrary to law."

Initially, I note that the Duxbury Town Treasurer has already reported expenditures totaling \$657.74. This implies that the treasurer believes that such an amount has been spent to influence or affect the vote on the override. You, in your capacity as clerk, have concurred, and, based upon the facts outlined above (and for the reasons discussed below), we agree.

The Bryant Letter suggests that a pro rata reporting and restitution are appropriate under the facts of this case for a number of reasons.² First, the Bryant Letter points out that expenditures in Anderson were authorized solely in anticipation of a ballot question and argues that the Newsletter's purpose

² The pro rata rate is presumably based on the fact that "advocacy" language occurs only on page 2. Even assuming pro rata reporting is appropriate (which we do not believe) it should be noted that page 5 references the school committee vote to request an override, pages 4 and 5 compare various budgets including the override budget, page 6 highlights the impact of the override and the overall tone of the Newsletter is, in our view, one that generally supports a pro-override position.

was generally to inform the public regarding school programs and financial status and the comment urging readers to vote for the override is merely incidental. It is also noted that the newsletters have been published annually for many years whether or not a ballot question has been before the town. Next, the Bryant Letter points to this Office's approval of a pro rata payment concept discussed in an earlier advisory opinion (See AO-89-14). We disagree.

First, the Office's 1989 opinion referenced above is not applicable in this case. AO-89-14 concluded that a multi-candidate political committee or so-called PAC could reimburse local boards of realtors on a pro rata basis for PAC materials included in mailing by local realtors. In the Duxbury situation we are concerned with prohibited expenditures by a public entity and not with permitted expenditures by multi-candidate political committees.

Next, and more importantly, the ramifications of concluding that pro rata reporting is appropriate in situations such as the one confronting Duxbury would substantially undermine the public policy considerations underlying the Anderson decision. Public officials would be able to "piggyback" their advocacy on public documents issued in the regular course of a city or town's business. For example, a 100-page annual town meeting warrant could carry a front page message to vote for or against the override and the public official advocating such a position would be required to pay only 1/100th of the cost. Furthermore, if pro rata reimbursement were appropriate, why should it be determined by the page and not the line? With a simple slight of hand, public officials would be given a tremendous advantage over those taxpayers who disagree with the position being advocated. The Legislature's goal of free and fair elections, achieved through a "hands off" policy by state and local government and the "financing of public debate [by] nongovernmental agencies and individuals" would be dramatically undercut. See Anderson, at 195.

For the above reasons, it is the Office's opinion that the Duxbury Town Treasurer must report the full amount of the cost of the Newsletter to reflect the total public costs incurred and not a pro rata amount based upon the number of pages on which advocacy occurs. Further, it is this Office's opinion that you are authorized under these circumstances to order restitution of the full amount.³

³ M.G.L. c.55, s.22A provides that the town clerk "may" order restitution; it does not mandate such restitution. Therefore, the town clerk may, in our view, order partial restitution. Such an order may in extraordinary circumstances be appropriate. However, in general, and specifically in this case, we do not think it is appropriate.

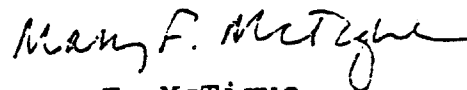
II. Payment of Legal Costs

The Duxbury Superintendent sought legal advice from school committee counsel regarding the application of the campaign finance laws to the Newsletter. It is the opinion of this Office that a school committee may retain⁴ legal counsel to provide a public employee such as the Superintendent legal advice on that employee's responsibilities under the campaign finance laws without violating M.G.L. c.55. The expenditure of public funds under the circumstances described above is not to promote, oppose or influence a ballot question but to advise a public employee of his or her legal obligations. There may be prohibitions on such expenditures under other laws or local charter. Therefore, you may wish to consult town counsel or the Department of Revenue's Division of Local Services.

This opinion has been rendered solely on the representations set forth in the information forwarded to this Office and outlined above and solely on the basis of M.G.L. c.55.

Please do not hesitate to contact this Office should you have any additional questions.

Very truly yours,



Mary F. McTigue
Director

cc: Superintendent Donald Kennedy
Duxbury Public Schools
Rebecca L. Bryant, Esq.
Stoneman, Chandler & Miller

⁴ I assume that counsel is paid by the school committee on a retainer or fee-for-service basis, and therefore, you are concerned that public funds may be misused in this case since the advice relates to the distribution of the Newsletter.